U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: OCT 12 2007

SRC 02 040 54594

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

for Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, initially approved the preference visa petition. Subsequently, the director issued a notice of intent to revoke the approval of the petition (NOIR). In a Notice of Revocation (NOR), the director ultimately revoked the approval of the Immigrant Petition for Alien Worker (Form I-140). The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

Section 205 of the Act, 8 U.S.C. § 1155, states, in pertinent part, that the Secretary of Homeland Security "may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204."

Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

> In *Matter of Estime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988) (citing *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987)).

By itself, the director's realization that a petition was incorrectly approved is good and sufficient cause for the revocation of the approval of an immigrant petition. *Id.* The approval of a visa petition vests no rights in the beneficiary of the petition, as approval of a visa petition is but a preliminary step in the visa application process. *Id.* at 589. The beneficiary is not, by mere approval of the petition, entitled to an immigrant visa. *Id.*

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. While Part 6 of the petition was left blank, the petitioner indicated on the Form ETA 750B that he seeks employment as a researcher. The petitioner asserts that an exemption from the requirement of a job offer, and thus of an alien employment certification, is in the national interest of the United States.

Despite the fact that the petition was not supported by any letters from members of the field beyond the petitioner's employer, evidence that the petitioner's published case studies had been cited or

comparable evidence of an impact in the field,[1] the director approved the petition. On August 24, 2005, the director issued the NOIR solely based on the director's lack of jurisdiction. On October 5, 2005, the director issued the first NOR. On February 21, 2006, the petitioner appealed that decision. On May 18, 2006, this office rejected the appeal as untimely filed pursuant to the regulation at 8 C.F.R. § 205.2(d). The AAO noted, however, that the revocation had not been properly served on the petitioner as it was sent to his old address and a copy was not sent to counsel.

Despite the recommendation of the AAO that the director reopen the matter on motion pursuant to the regulation at 8 C.F.R. § 103.5(a)(5)(ii) and issue a new, modified NOIR after reviewing the record, the director simply reissued the NOR on June 3, 2006, properly serving counsel. A timely appeal followed, which is now before us. As the sole issue in the NOIR is whether the director had jurisdiction over the petition, that issue is the sole issue before us.[2]

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. --
>
> > (A) In general. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of job offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The regulation at 8 C.F.R. § 204.5(b) provides:

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[1] To qualify for the national interest waiver, a petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Matter of New York State Dep't of Transp.* [hereinafter "NYSDOT"], 22 I&N Dec. 215, 219 n.6 (Commr. 1998).

[2] A revocation can only be grounded upon, and the petitioner is only obliged to respond to, the factual allegations in the notice of intent to revoke. *Matter of Arias,* 19 I&N Dec. 568, 570 (BIA 1988).

> *Jurisdiction.* Form I-140 or I-360 must be filed with the Service Center having jurisdiction over the intended place of employment, unless specifically designated for local filing by the Associate Commissioner for Examinations.

The regulation at 8 C.F.R. § 103.2(a)(1) provides, in pertinent part:

> *General.* Every application, petition, appeal, motion, request, or other document submitted on the form prescribed by this chapter shall be executed and filed in accordance with the instructions on the form, such instructions (including where an application or petition should be filed) being hereby incorporated into the particular section of the regulations in this chapter requiring its submission.

The instructions to the Form I-140 at the time the petition was filed, provided, in pertinent part:

> **Where to File.**
>
> File this petition at the INS service center with jurisdiction over the place where the alien will be employed.
>
> If the alien's employment will be in Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, New Mexico, North Carolina, South Carolina, Oklahoma, Tennessee, or Texas, mail the petition to:
>
> USINS Texas Service Center
> P.O. Box 852135
> Mesquite, TX 75185-2135
>
> * * *
>
> If the alien's employment will be in . . . Michigan . . ., mail the petition to:
>
> USINS Nebraska Service Center
> P.O. Box 87140
> Lincoln, NE 68501-7140

The petitioner filed the petition on November 19, 2001 with the Texas Service Center. The petitioner listed his address in Parts 1 and 3 of the petition as in care of prior counsel at [redacted] The petitioner left Part 6 of the petition, "Basic information about the proposed employment," blank. On the Form G-28 Notice of Entry of Appearance as Attorney or Representative, the petitioner's address is again provided as in care of prior counsel at the same Texas address. Prior counsel's phone number is listed without an area code. As noted by counsel on appeal, the petition was supported by a Form ETA 750B that listed the petitioner's address and employment in Michigan. On

page 5 of prior counsel's brief, he asserts that the "labor certification process" is too lengthy and is taking over three years "in the Detroit area."

Despite the references to Michigan on the Form ETA 750 and in prior counsel's cover letter, the director assumed jurisdiction and approved the petition. As stated above, the director subsequently realized the error and issued an NOIR. While counsel has asserted that the NOIR was not based on "new" information, the director's realization that a petition was incorrectly approved is good and sufficient cause for the revocation of the approval of an immigrant petition. *Matter of Ho,* 19 I&N Dec. at 590.

In response to the NOIR, counsel asserted that neither the petitioner nor prior counsel had misrepresented the petitioner's residence or place of work. Counsel noted that the regulation at 8 C.F.R. § 204.5(b) provides that the petition should be filed with the office that has jurisdiction over the location of the petitioner's *intended* place of employment. Counsel asserted that the petitioner "never intended to stay working in the State of Michigan longer than he had to and in fact he did leave the state in 2004." Counsel noted that the petitioner then worked in Indiana and is now working in Ohio, but still intends to work in the southeastern United States. Finally, counsel noted that the petition is based on a waiver of the job offer requirement and, thus, the petitioner did not need an offer of employment in the southeastern United States to justify jurisdiction in Texas.

The petitioner submitted an amended Form I-140 listing "Not Applicable" for every line in Part 6 of the petition except for line 4, "Address where the person will work if different from address in Part 1 [petitioner's address]," where the petitioner stated: "A location to be determined in the Southeastern United States." In addition, the petitioner submitted an affidavit from the petitioner asserting that he always intended to abandon Michigan after experiencing the state's "bitter cold." While he admits that he had no particular state in mind, he asserts that would be willing to work almost anywhere in the southeastern United States, with his first preference being Florida. The petitioner also submitted an affidavit from prior counsel asserting that the Texas address is a private mailbox at a "UPS Store" and that he uses the address "as a convenience for myself and my clients." He further asserts that he did not attempt to mislead the director, noting that counsel's address cannot serve as a basis for jurisdiction. He asserts that he listed the Texas post office address for the petitioner to ensure that he received all notices from the director. He does not explain why a private mailbox several states removed from his office is more convenient for himself or his clients, who cannot visit him at a private mailbox location.

The director concluded in both NORs that the petitioner had not overcome the ground for revocation of the approval set forth in the NOIR. On appeal, counsel reiterates previous assertions, stating that the petitioner would have provided false information had he indicated an intent to remain employed in Michigan. Counsel asserts that had the petitioner found employment in the southeastern United States, any approval by Nebraska would be subject to revocation.

The petitioner's entire filing history with legacy Immigration and Naturalization Service (INS), now Citizenship and Immigration Services (CIS), detracts from the credibility of his claim that he always

intended to abandon Michigan and seek employment in the southeastern United States. On June 5, 1998, the petitioner filed a Form I-140 petition with the Nebraska Service Center seeking classification as an advanced degree professional, receipt number LIN 98 174 51840. The petitioner indicated that the proposed employment was as a physician in Wayne County, Michigan. The petitioner sought a waiver of the job offer based on his willingness to work as a physician in Wayne County, Michigan, asserted to be a medically underserved area. On August 7, 1998, this office issued the precedent decision *Matter of New York State Dep't of Transp.*, 22 I&N Dec. 215 (Commr. 1998), which held that a petitioner seeking a waiver from the job offer in the national interest must demonstrate that the benefit of their services will be national in scope. On September 15, 1998, the director issued a request for additional evidence based on the new precedent decision. In a letter dated November 19, 1998, the petitioner expressed his "intention to remain in the U.S., specifically Detroit, Wayne County, Michigan, to provide primary medical care services to the underserved population of the [sic] Wayne County." We note that as of this date, the petitioner had already resided in Michigan for three and a half years and, thus, was experiencing his fourth Michigan winter. The director, Nebraska Service Center, concluded that the petitioner's benefits as a physician would not be national in scope and denied the petition on August 12, 1999.

On October 18, 2000, the petitioner filed a motion to reopen the denial of that petition. The motion was based on the Nursing Relief for Disadvantaged Areas Act of 1999, which included provisions allowing doctors serving in underserved areas to seek immigrant benefits under section 203(b)(2)(B)(ii) of the Act. In support of the motion, the attorney of record in that matter asserted that the petitioner would substantially benefit the United States "by providing significant health care services to the low income population of Detroit (Wayne County), Michigan, a designated Health Professional Shortage Area." The director denied the motion pursuant to the regulation at 8 C.F.R. § 204.12(d)(6).

On March 23, 2001, the petitioner filed another Form I-140 petition with the Nebraska Service Center, receipt number LIN 01 133 54658. Prior counsel in this matter also represented the petitioner on this earlier petition. On this petition, the petitioner listed his address as in care of prior counsel's Michigan address and the Form G-28 lists prior counsel's Michigan address. The director, Nebraska Service Center, denied the petition on August 13, 2001, concluding that two letters from the petitioner's immediate circle of colleagues could not serve to establish that a waiver of the job offer requirement was in the national interest.

The instant petition was filed on November 19, 2001 and its procedural history has been recounted above. On June 12, 2006, The Ohio State University filed a petition on behalf of the petitioner with the Nebraska Service Center. Despite counsel's failure to address the regulatory criteria for the Schedule A, Group II designation sought in that matter, set forth at 20 C.F.R. § 656.15(d)(1), the director, Nebraska Service Center, approved that petition on October 4, 2007.

The petitioner's explanation for filing the instant petition in Texas and prior counsel's explanation for using a Texas private mailbox are not consistent with the petitioner's filing history, set forth above. The petitioner has not submitted any evidence that, prior to November 2001, he had taken any

affirmative steps toward acquiring employment in the southeastern United States. The petitioner's dislike of Michigan winters and alleged desire to, at some unspecified date in the future seek employment in some as yet unidentified southeastern state was not a sufficient basis for Texas to assume jurisdiction pursuant to 8 C.F.R. § 204.5(b). Had the petitioner filed the instant petition with the Nebraska Service Center and subsequently secured employment in the southeastern United States, his petition would still have been properly filed because his documented intended place of employment at the time of filing was within the jurisdiction of the Nebraska Service Center and his change of employment would not have been a legitimate basis for revocation.

Finally, we note that even if the petition had been properly filed, the record does not appear to establish the petitioner's eligibility for immigrant classification under section 203(b)(2) of the Act as a member of the professions holding an advanced degree and exempted from the job offer requirement. As noted on page 2, the petitioner did not submit documentation of a past history of achievement with some degree of influence on the field as a whole, evidence required to qualify for a national interest waiver of the job offer requirement. *NYSDOT,* 22 I&N Dec. at 219 n.6. Thus, even if we withdrew the director's basis for revocation, the petition would not be approvable and we would need to remand the matter to the director for a review of the petition on its merits.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This decision is without prejudice to the filing of a new petition by a United States employer accompanied by an alien employment certification certified by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.